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SUPREME COURT OF THE UNITED STATES

No. 304

IN RE: Estate of LEETHA H. GEER, deceased

FRED S. GEER, Executor of the Estate of LEETHA H. GEER, deceased and FRED S. GEER, Individually,
Appellants,

v.

STANLEY J. BOWERS, Tax Commissioner of Ohio,
Appellee.

APPEAL FROM THE SUPREME COURT OF OHIO

JURISDICTIONAL STATEMENT

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SUPREME COURT OF THE UNITED STATES

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IN RE. Estate of LEETHA H. GEER, deceased

FRED S. GEER, Executor of the Estate of LEETHA H. GEER, deceased and FRED S. GEER, Individually,

Appellants,

v.

STANLEY J. BOWERS, Tax Commissioner of Ohio,

Appellee.

APPEAL FROM THE SUPREME COURT OF OHIO

STATEMENT IN SUPPORT OF JURISDICTION

The Appellants, FRED S. GEER, Executor of the estate of LEETHA H. GEER, deceased, and FRED S. GEER, Individually, in support of the jurisdiction of the Supreme Court of the United States to review the above entitled cause on appeal, respectfully represents:

1. Reference to Official and Unofficial Reports of the Opinion Delivered in the Court Below

(a) The official report of the opinion delivered by the Supreme Court of Ohio is contained in Ohio State Reports, Volume 173, Page 264; the unofficial report of said opinion is contained in North Eastern Reporter 2d, Volume 181, Page 268.

The text of said opinion is set forth in Appendix 1 to this statement.

(b) Statement of grounds upon which jurisdiction of this Court is invoked.

(i) This proceeding is an appeal by Appellants FRED S. GEER, Executor, and FRED S. GEER, Individually, from a final decree of the Supreme Court of Ohio, a State court of last resort, dismissing an appeal as of right from the Court of Appeals for Mahoning County, Seventh Judicial District, on the grounds that no debatable constitutional question was involved.

The appeal as of right was filed pursuant to Ohio Revised Code, Section 2505.29, which provides in substance that leave to file such an appeal is not required as to a judgment or final order of the Court of Appeals in cases involving questions under the Constitution of the United States, or of the State of Ohio.

The Motion to Certify the Record was filed pursuant to another portion of said Section which requires leave, in most other cases, and the provisions of Article IV, Section 2, of the Ohio Constitution, which provides that "in cases of public or great general interest, the Supreme Court may, within such limitations of time as may be prescribed by law, direct any court of appeals to certify its record to the Supreme Court, and may review, and affirm, modify or reverse the judgment of the court of appeals."

The sole question involved is the constitutionality of Ohio Revised Code, Section 5731.02(E) as amended in 1957.

(ii) The judgment dismissing the appeal as of right was dated and entered on March 21, 1962.

The order overruling the Motion to Certify was made and entered on March 21, 1962.

The Notice of Appeal was filed in the Supreme Court of Ohio on the 11th day of June, 1962, within ninety (90) days of the judgment.

(iii) The Statutory provision believed to confer on this Court jurisdiction of appeal is 28 USC, Article 1257(2).

(iv) Cases believed to sustain the jurisdiction of the United States Supreme Court:

Matthews v. *Huwe*, 269 U.S., 262
Bryant v. *Zimmerman*, 278 U.S., 63
Schlesinger v. *Wisconsin*, 270 U.S., 230.

(v) This appeal involves the validty of Ohio Revised Code Section 5731.02(E) which the Probate Court held constitutional. The Court of Appeals affirmed this decision, and the Supreme Court of Ohio dismissed the appeal as of right on the ground that no debatable constitutional question was involved.

Said amended section is found in the Supplement to Volume 57, Ohio Revised Code, and insofar as is pertinent, is as follows:

> "A tax is hereby levied upon the succession to any property passing, in trust or otherwise, to or for the use of a person, institution, or corporation, in the following cases:
>
> " * * *
>
> "(E) Whenever property is held by two or more persons jointly, so that upon the death of one of them the survivor has a right to the immediate ownership or possession and enjoyment of the whole property, *the accrual of such right by the death of one of them shall be deemed* a succession taxable under *this section*, in the same manner as if the enhanced value of the whole property belonged absolutely to the deceased person, and he had bequeathed the same to the survivor by will, *provided when the persons holding said property jointly are a husband and wife, the survivor shall be deemed to have a succession taxable to the*

extent of one-half the total value of the property without regard to enhancement . . . " (Emphasis added)

(c) **Questions Presented**

The questions presented by this appeal are as follows:

(1) Whether Section 5731.02(E), Ohio Revised Code, which has been construed by the Supreme Court of Ohio to impose a succession tax upon one-half the total value of the survivorship property held by husband and wife, without regard to any contribution or actual ownership of the survivor is repugnant to the due process clause of the Fifth Amendment and the Fourteenth Amendment of the United States Constitution.

(2) Whether said Statute construed as aforesaid is repugnant to the equal protection clause of the Fourteenth Amendment of the United States Constitution.

(3) Whether said Section, which is a taxing statute, as construed aforesaid, in view of Ohio law as to husband and wife, is repugnant to Article I, Section 10 of the United States Constitution in that it impairs the obligation of contract as between husband and wife as to such joint and survivorship accounts.

(d) **Statement of the Case**

Leetha H. Geer died July 24, 1958, leaving FRED S. GEER, her surviving spouse. She was a resident of Youngstown, Mahoning County, Ohio. The administration of her estate was in the Probate Court of Mahoning County, Case No. 55709, in which case FRED S. GEER was appointed Executor. In determining the inheritance tax, the Probate Court included seven joint and survivorship accounts standing in the names of FRED S. GEER or LEETHA H. GEER, totaling $126,297.55 as a taxable succession to FRED S. GEER, to the

extent of one-half of the total amount, under the provisions of Ohio Revised Code, Section 5731.02(E). These accounts were the sole property of FRED S. GEER, as shown by his affidavit attached to the Application. Aside from these accounts, Mr. and Mrs. Geer had two other joint and survivorship bank accounts, totaling $53,204.03 which were likewise taxed. In these two accounts there was a co-mingling of funds. (See Application and Journal Entry filed December 12, 1958, in the transcript of the Probate Court.) Separate exceptions to the taxation of said seven accounts, totaling $126,297.55, were filed by FRED S. GEER as Executor and FRED S. GEER, Individually, on February 5, 1959. The other two accounts were not included in the exceptions because of the co-mingling of funds. These separate exceptions were consolidated by the Probate Court at the time of hearing. The first hearing was on April 27, 1959. The transcript thereof is referred to as Part A. (Cited R-A 1, A 2, Etc.) The second hearing was July 15, 1959. The transcript thereof is referred to as Part B. (Cited R-B 1, B 2, etc.). The Probate Court found Mr. Geer contributed the entire amount of said seven accounts. (See Page 3 of the Probate Court Journal Entry, Appendix 2.)

Mr. Geer was the sole witness at both hearings. He testified specifically that the agreement between him and Mrs. Geer was that she was to make no withdrawals on these accounts unless some emergency arose when other funds were not available; that at all times she had other substantial accounts ample for any of their needs. (See R B-10)

The Probate Court found that no withdrawals were made by either Mr. or Mrs. Geer on these seven accounts during her lifetime. (See Page 3, Probate Court Journal Entry, Appendix 2.)

Mr. Geer further testified specifically on cross examina-

tion that he did not make any gift to Mrs. Geer of any present interest in these accounts during his lifetime. (R-A 27 and 28)

The Probate Court, on Page 3 of its Journal Entry (Appendix 2, Page 4), found and determined, ". . . that by the terms of said deposits as well as by the private arrangements of Fred S. Geer and Leetha H. Geer that Leetha H. Geer had an equitable as well as a legal right to said accounts during her life equal to that of Fred S. Geer . . ."

And on Page 4 of the Journal Entry (Appendix 2, Page 4), the Court makes this further finding:

> ". . . that the evidence and admissions in testimony by the exceptor Fred S. Geer clearly indicated that by the nature of the accounts and the deposits either Fred S. Geer or Leetha H. Geer could have withdrawn any or all of said moneys during the life of both, and for the reason that by the testimony of Fred S. Geer it was clearly shown that their understanding gave either Leetha H. Geer or Fred S. Geer an equal right to withdraw all or any part of said accounts during the life of both for the use of the one withdrawing it, . . ."

It is respectfully submitted that neither of these legal conclusions are supported by the evidence. This is not a question of the weight of the evidence, as there is no conflict in the evidence. The Court properly found that Mr. Geer, the surviving spouse, contributed the entire amount of these seven accounts. He testified that Mrs. Geer understood that there was no intent to make her a gift of any present interest in these funds during his lifetime. (R-A 28.)

Contract Between the Bank and the Depositors

A joint and survivorship account involves two independent contracts: First, a contract between the bank and two or more persons by which the bank is authorized to pay said funds to either of said persons whether the other is living or not.

This is authorized by Ohio Revised Code, Section 1105.09, (G.C. 710-120). This is a section of the banking laws and drafted solely for the benefit and protection of the banks. It creates no inference and has no bearing whatever as to whether the funds are jointly owned, or the sole property of one of the depositors, or what the arrangement or contract is between the depositors themselves.

Bauman v. *Walter*, 160 Ohio St., 273; 116 N. E. 2d, 435.

Judge Taft on Page 275 of the opinion states:

> "Since Section 710-120, Geneal Code, was enacted solely for the benefit and protection of banks (see *Union Properties, Inc.* v. *Cleveland Trust Co.*, 152 Ohio St., 430, 433, 89 N. E. (2d), 638, and *Nicholas v. Metropolitan Life Ins. Co.*, 137 Ohio St., 542, 544, 31 N.E. (2d) 224,) *that section is not helpful in determining the rights in the deposits of the obligees as between themselves.* (Emphasis added)
>
> ". . . However in the instant case, it is conceded that the money deposited in these two accounts belonged to the wife before the deposits were made. *If the husband is entitled to any part of the amounts of these deposits, some part of the money* or of the obligation of the bank to pay back the amount of that money so deposited *must have passed somehow from the wife to the husband.* See annotations 48 A.L.R., 189, 190; 66 A.L.R., 881, 882; 103 A.L.R., 1123; 135 A.L.R., 993; 149 A.L.R., 879. (Emphasis added)

"The husband certainly can not claim that *anything was transferred to him for valuable consideration.* Nothing in the record supports a conclusion that the husband incurred any detriment or that there was any bargain under which the wife was to receive any benefit from the husband which could represent *such a consideration.* Likewise there was no transfer in the requisite form to constitute a valid bequest." (Emphasis added)

Contract Between the Depositors Themselves

A joint and survivorship account involves: Second, who was the actual owner of the funds deposited; whether they were jointly owned, or were the sole property of one of the depositors, and in either case, what was the agreement as to their respective rights between themselves. These are the elements that determine the rights of the depositors as between themselves after the deposit has been made.

Fectau v. *Trust Company*, 171 Ohio St., 121; 167 N.E. 2d, 890.

The opinion, page 124 and 125 states:

"Under the Ohio rule *the creation of a joint and survivorship bank account is a contractual matter,* and, where a contest arises as to the ownership of funds in an account, carried in the joint names of two people, and one of them has wholly withdrawn and appropriated such funds to his own use, such case is to be decided on its own facts. *The form of the deposit is not conclusive,* and the circumstances that by the terms of the deposit either person may withdraw the whole amount is not always dispositive of the issue of ownership. (Emphasis added)

"The real intent of the parties is often a question of fact, and evidence may be admitted to show that intent, even where by signature card or in some other way a joint account has apparently been established. See 7 Ohio Jurisprudence (2d), 253, Section 120 et seq., and 7 American Jurisprudence, 299, Section 425 et seq."

The opinion, page 126 states:

"This court has held on several occasions that Section 1105.09, Revised Code (formerly 710-120, General Code), was enacted solely for the protection of banks. Nicholas v. Metropolitan Life Ins. Co., 137 Ohio St., 542; 544, 31 N. E. (2d), 224, and Bauman v. Walter, 160 Ohio St., 273, 275, 116 N. E. (2d), 435. That section does not pass, and was not intended to pass, title to a deposit of money. 7 Ohio Jurisprudence (2d), 258, Section 123."

In *In Re Estate of Daniel*, 159 Ohio St., 109; 111 N.E. 2d, 252, Syllabus 1 is as follows:

"The Ohio succession tax is not a tax on the estate of a decedent, but is a tax upon the succession or the right and privilege to receive property from the decedent, 'succession' being defined as the passing of property in possession or enjoyment, present or future."

In *Tax Commission* v. *Lamprecht*, 107 Ohio St., 535; 140 N.E. 333, the opinion, Page 547, states:

". . . The value of the right to receive must be exactly equal to the value of the property which passes, and *it is shocking to every sense of justice to compute the rate upon a right which is less valuable than the*

property which passes to the heir pursuant to that right." (Emphasis added)

In Re Estate of Fulk, 136 Ohio St., 233; 24 N.E. 2d, 1020, on Page 235 the opinion states:

"A joint deposit of funds may be made in different ways. The deposit may be one of joint earnings by husband and wife, as in the instant case, or the funds may have been owned and in the name of the husband alone and later the name of the wife or another added either for the purpose of a gift or *as a matter of convenience.* Other situations may arise where a present joint or other interest is created." (Emphasis added)

Page 238— . . . . . "The *primary objective in such cases is to determine the real intention of the parties. For the most part each case must rest upon its own particular facts.*" (Emphasis added)

Union Properties, Inc. v. *Trust Company*, 152 Ohio St., 430; 89 N. E. 2d, 638.

In this case a judgment creditor of the husband's during the life of the husband and wife, attempted by a proceeding in aid of execution to appropriate the husband's rights in a joint and survivorship account in the name of husband and wife. Syllabus 1 states:

. . . "the form of the deposit is not conclusive on the subject of joint ownership and evidence may be introduced that the deposit was in truth made and maintained on a different basis."

The court held that the money in such account was not subject to appropriation by the husband's judgment creditor.

. . . "where it is found upon evidence of sufficient probative force that notwithstanding the form of the de-

posit the money is in reality the sole property of the wife."

The above cases show clearly that the making of a joint and survivorship account with the bank does not effect in any way the rights of the depositors between themselves, and does not in and of itself pass any title to the deposit from one of the depositors to the other; that the Probate Court when it stated on Page 3 of its Journal Entry "that by the terms of said deposits . . . . Leetha H. Geer had an equitable as well as a legal right to said accounts during her life equal to that of Fred S. Geer" the Court was in error in such legal conclusion. So far as the testimony is concerned there is nothing in the record to support the claim that any present interest in said accounts passed to said Leetha H. Geer during her lifetime.

For the same reason, the statement on Page 4 of the Journal Entry quoted above on Page 6 is a legal conclusion that is equally erroneous.

In determining the rights of the parties between themselves to these accounts, we must keep in mind that Ohio has never recognized common law joint tenancies, and is not a community property state such as California. In Ohio a husband and wife may hold and dispose of property, real or personal, the same as if unmarried; may contract as if unmarried with third parties, or with each other. These rights are guaranteed by Ohio Revised Code as follows:

"Section 3103.04 INTEREST IN THE PROPERTY OF THE OTHER. (GC Sec. 8002-4)

"Neither husband nor wife has any interest in the property of the other, except as mentioned in section 31031.03 of the Revised Code, the right to dower, and the right to remain in the mansion house after the death of either. Neither can be excluded from the

other's dwelling, except upon a decree or order of injunction made by a court of competent jurisdiction."

"Section 3103.05 CONTRACTS (GC 8002-5).

"A husband or wife may enter into any agreement or transaction with the other, or with any other person, which either might if unmarried; subject, in transactions between themselves, to the general rules which control the actions of persons occupying confidential relations with each other."

"Section 3103.07 PROPERTY (GC 8002-7)

"A married person may take, hold, and dispose of property, real or personal, the same as if unmarried."

The Federal Questions Were Raised in Each Court

The Federal questions were raised in the Probate Court in the consolidated Brief of Appellants in support of Appellants' Exceptions, filed May 21, 1959, as follows:

Page 11—"If the only interpretation of the last clause in Section 5731.02(E) is that 50% of all joint and survivorship property held by husband and wife is to be taxed to the survivor as a succession, even though evidence is produced showing conclusively that the survivorship property has at all times been the sole property of the survivor, then said section is in violation of ..... (Citing sections of Ohio Constitution) Since it impairs the obligations of the joint and survivorship contract, it is also in violation of Article I, Section 10 of the Constitution of the United States. It also violates Amendment XIV of the U. S. Constitution."

Page 13—"The Supreme Court of the United States has consistently held that a statute that attempts to

legislate a conclusive presumption which is not rebuttable by evidence of sufficient probative force is unconstitutional and void, under the Fifth Amendment and the Fourteenth Amendment of the Constitution of the United States."

"*Schlesinger* v. *Wisconsin*, 270 U.S., 230—The syllabus is as follows:" (Paragraphs 1, 2 and 3 of the syllabus are then quoted in full.)

"*Hoeper* v. *Tax Commissioner of Wisconsin*, 284, U.S., 206 The syllabus is as follows:" (Paragraphs 1 and 2 of the syllabus are quoted in full.)

"*Heiner, Collector of Int. Rev.* v. *Donnan*, 285 U.S., 312 The syllabus states:" Paragraphs 1, 2, 3, 4 and 5 of the syllabus are quoted in full.)

The Probate Court rendered no opinion. On Page 4 of the Journal Entry, Appendix 2 herein, the Court states:

"The Court finds and determines that Section 5731.02 (E), Revised Code, is a constitutional, valid and reasonable exercise of the taxing power of the State of Ohio."

The Federal questions were raised in the Court of Appeals in the Joint Assignment of Errors, paragraph 4, page 2, filed May 10, 1961, as follows:

"The Court erred in holding that Section 5731.02(E), Revised Code, as herein interpreted is constitutional." (See Journal Entry, Page 4.)

On Page 29 of Appellants' Brief in the Court of Appeals, filed May 10, 1961, is set forth the same introductory statement quoted above from Appellants' Brief in the Probate Court, followed by the same citations and quotations.

The Court of Appeals rendered no opinion. A copy of the Journal Entry affirming the decision of the Probate Court is set forth in Appendix 3.

The Federal question was raised in the Supreme Court of Ohio in Appellants' Assignment of Errors, paragraphs 2 and 6, as follows:

> Paragraph 2—"The Probate Court erred in holding Section 5731.02(E), Revised Code, as herein interpreted is constitutional."
>
> Paragraph 6—"The judgment of the Probate Court and the Court of Appeals are contrary to the law and in violation of the Ohio and the United States Constitutions."

On Page 15 of the Brief is set forth the same introductory statement quoted from the Brief in the Probate Court with reference to the same citations and the same quotations from *Schlesinger* v. *Wisconsin*, *Hoeper* v. *Tax Commission of Wisconsin* and *Heiner, Collector of Int. Rev.* v. *Donnan*.

On Page 17 of said Brief it is stated:

> "Such interpretation, impairing the obligations of contract, is also in violation of Article I, Section 10 of the Constitution of the United States. Such construction also violates the due process provision of the Fifth Amendment and the Fourteenth Amendment of the Constitution of the United States."

A copy of the Journal Entry of the Supreme Court of Ohio dismissing the Appeal as of Right, dated and filed March 21, 1962, and a copy of the Journal Entry of said Court overruling the Motion to Certify the Record, dated and filed March 21, 1962, are set forth in Appendix 4.

(c) **The Federal Questions Are Substantial**

The Federal questions of due process under the Fifth Amendment and the Fourteenth Amendment, set forth in paragraph (a) in the Notice of Appeal, and the impairment of the obligation of contract in violation of Article I, Section 10 of the United States Constitution set forth in paragraph (c) of the Notice of Appeal were specifically briefed and argued orally in each Court. The violation of the equal protection clause of the Fourteenth Amendment set forth in paragraph (b) of the Notice of Appeal Amendment was not specifically stated. However, it is believed that this provision is so closely allied to the due process provision that it may be encompassed therein. If the Court feels that it raises a new question, further proceedings will be limited to the due process provision and the impairment of contract as between the husband and wife.

Over the years I have handled a great many estates. While I have not compiled any exact statistics, it is my considered judgment that in cases of either a husband or wife dying, the great majority involve some joint and survivorship property held in the name of the decedent or the surviving spouse. This Amendment to Ohio Revised Code, Section 5731.02(E) in 1957, by which the husband and wife provision was added, involves every estate in Ohio where the decedent and surviving spouse hold joint and survivorship property.

It is believed that the following cases authorize this appeal:

Matthews v. *Huwe*, 269 U.S. 262—In that case an appeal as of right was denied by the Supreme Court of Ohio, but no motion to certify was filed.

In this case a Motion to Certify was also filed and overruled by the Ohio Supreme Court.

Bryant v. *Zimmerman*, 278 U.S., 63—Syllabus 2 and 3 set forth the requirements for presenting the Federal question in the state courts. We believe that the Federal questions involved herein were presented in full compliance with these requirements.

The Supreme Court of Ohio in the case of *In Re the Estate of Evans, Bowers, Tax Commissioner, Appellee* v. *Evans, Executor, Appellant*, Case No. 37227, decided February 28, 1962, 173 Ohio St. 132, found in the advanced sheets set forth in the Ohio Bar, Volume 35, No. 10 of March 5, 1962; 180 N.E. (2d), 827, admitted the appeal in that case as of right, a constitutional question being involved. The first two lines of the decision are as follows:

> "The single question raised by this appeal is the constitutionality of Section 5731.02(E), Revised Code . . ."

The syllabus in that case is as follows:

> "The imposition of a tax upon one-half of the amount of a succession which passes to a husband or wife by virtue of a joint and survivorship contract owned by them constitutes a valid exercise of the legislative power."

Appellants' Brief in this case was filed in the Supreme Court of Ohio on January 18, 1962, and was on file when that case was heard, but of course, had not come to the attention of the Court. The reasoning in the majority opinion in that case is in conflict with a long line of decisions of the Supreme Court of Ohio, going back many years, as to the rights of decedents in joint and survivorship accounts between the depositors themselves. This is well pointed out in Judge Taft's dissenting opinion, citing many of these prior decisions. Of course, that case is the

first case decided by the Supreme Court since the amendment to Section 5731.02(E), Ohio Revised Code, in 1957, which added to said section the following:

> ". . . provided when the persons holding said property jointly are a husband and wife, the survivor shall be deemed to have a succession taxable to the extent of one-half the total value of the property without regard to enhancement;"

This provision creates a conclusive presumption.

The Supreme Court of Ohio in dismissing Appellant's appeal as of right in this case in that no debatable constitutional question was involved, by inference at least, held the statute constitutional.

The syllabus in the Evans case states that the section herein involved "*constitutes a valid exercise of the legislative power*" which necessarily implies that said section is constitutional and is apparently the basis of the Court's decision in this case that no debatable constitutional question was involved.

This Court has consistently held that a statute which creates a conclusive presumption of fact which the taxpayer is forbidden to controvert, violates the due process clause of the Fifth and the Fourteenth Amendments. *Schlesinger* v. *Wisconsin*, 270 U.S., 23, and *Heiner* v. *Donnan*, 285 U.S., 312.

It is, therefore, believed that the Federal questions herein involved are important not only to the Appellants, but to all husbands and wives in the state of Ohio who are the holders of joint and survivorship property, and are therefore so substantial as to come within the jurisdiction of this Court.

Conclusion

Appellants respectfully contend that Section 5731.02(E), Ohio Revised Code violates the due process clause of the Fifth Amendment and the Fourteenth Amendment of the United States Constitution.

That said section is repugnant to the equal protection clause of the Fourteenth Amendment of the United States Constitution.

That said section impairs the obligation of the joint and survivorship contract between husband and wife as to said accounts and is in violation of Article I, Section 10 of the Constitution.

That the decision of the Supreme Court of Ohio, accordingly, is in violation of the aforesaid provisions of the Constitution of the United States.

Respectfully submitted,

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Youngstown 3, Ohio,
Attorney for Appellants.

APPENDIX 1

Opinion *Per Curiam*

IN RE ESTATE OF GEER:

GEER, EXR., ET AL., *Appellants*,

v.

BOWERS, TAX CMMR., *Appellee*

Supreme Court—Dismissal—No debatable constitutional question involved—Succession tax—Successions subject to tax—Joint and survivorship bank accounts—Section 5731.02(E), Revised Code—Statutory construction—Constitutionality.

(No. 37393—Decided March 21, 1962)

APPEAL from the Court of Appeals for Mahoning County.

Mr. H. Herschel Hunt, for appellants.

Mr. Mark McElroy, attorney general, and *Mr. Joseph L. White*, for appellee.

The appeal as of right herein is dimisssed for the reason that no debatable constitutional question is involved.

Appeal dismissed.

WEYGANDT, C. J., ZIMMERMAN, MATTHIAS, BELL, DOYLE and O'NEILL, JJ., concur.

DOYLE, J., of the Ninth Appellate District, sitting by designation in the place and stead of HERBERT, J.

APPENDIX 2

IN THE PROBATE COURT

Case No. 55709, Doc. 90 pg 221

IN THE MATTER OF THE ESTATE OF LEETHA H. GEER, Deceased.

JOURNAL ENTRY

STATE OF OHIO,
Mahoning County, ss:

This matter comes on to be heard upon the exceptions of Fred S. Geer as Executor of the Estate of Leetha H. Geer, deceased, and exceptions of Fred S. Geer individually to the determination of inheritance tax made by this Court on seven joint and survivor accounts listed in the names of said Fred S. Geer and Leetha H. Geer, and which accounts were determined by this Court to be subject to inheritance tax under the law of Ohio existing on the date of the death of said Leetha H. Geer, to wit: July 24, 1958, and which said seven joint and survivor accounts together with the amount on deposit in each of said accounts on the date of death of Leetha H. Geer, deceased, and the bank in which each account was deposited were as follows:

First Federal Saving & Loan, Youngstown, Ohio	SA	$11,229.02
Peoples Bldg. & Loan Ass'n., Beaver Falls, Pa.,	SA	20,664.28
Federal Sav. & Loan Ass'n., New Brighton, Pa.	SA	5,731.14
Mellon Nat'l. Bank & Trust Co., Pittsburgh, Pa.	CA	25,078.13
Mellon Nat'l. Bank & Trust Co., Pittsburgh, Pa.	SA	26,779.10
First Nat'l. Bank of Miami, Florida	CA	15,969.13
First Nat'l. Bank of Miami, Florida	SA	20,846.75
totaling the amount of		$126,297.55

This Court found and determined that one-half of said $126,297.55, to wit: $63,148.76 was a taxable succession to Fred S. Geer, surviving spouse of Leetha H. Geer, and the survivor on the above named seven accounts.

In addition to the above seven joint and survivor accounts there existed on the date of death of said Leetha H. Geer two additional joint and survivor accounts which together with the amount on deposit in each of said accounts on the date of death of Leetha H. Geer, deceased, and the bank in

(Page 2 of Journal)

which each account was deposited were as follows:

Mahoning National Bank, Youngstown, Ohio	CA	$45,650.35
Dollar Savings & Trust Co., Youngstown, Ohio	CA	7,553.68
totaling the amount of		$53,204.03

This Court found and determined that one-half of said $53,204.03, to wit: $26,602.02 was a taxable succession to Fred S. Geer, surviving spouse of Leetha H. Geer, and the survivor on the above named two accounts.

Upon said exceptions being filed this matter was set for hearing and final determination by this Court with the single issue of law being the right of the State of Ohio to legally tax as a taxable succession to Fred S. Geer surviving spouse and named survivor in said accounts one-half of said $125,297.55 and one-half of said $53,204.03.

Prior to hearing and taking of evidence, it was agreed by all of the parties that the hearings on the exception filed by Fred S. Geer as Executor and the exceptions filed by Fred S. Geer, individually, should be consolidated and the testimony, evidence, briefs and arguments of counsel should be considered as applicable to each or both of said exceptions insofar as respectively pertinent.

Upon the testimony and evidence and after the filing of briefs and argument of counsel the Court finds and determines the following facts:

Leetha H. Geer died July 24, 1958 a resident of Youngstown, Mahoning County, Ohio, leaving Fred S. Geer as her surviving spouse.

During their married life the above named accounts were created.

Each of said accounts was payable to and subject to withdrawal in whole or part by either Leetha H. Geer or Fred S. Geer and could have been withdrawn for the use and benefit of the one withdrawing the account.

(Page 3 of Journal)

The amount on deposit in each account on the date of death of either Fred S. Geer, husband, or Leetha H. Geer, wife, was payable to the surviving spouse as the sole property of the surviving spouse.

Fred S. Geer, surviving spouse, contributed the entire amount of the following seven accounts:

First Federal Savings & Loan, Youngstown, Ohio	SA	$11,229.02
Peoples Bldg. & Loan Ass'n., Beaver Falls, Pa.,	SA	20,664.28
Federal Savings & Loan Ass'n., New Brighton, Pa.	SA	5,731.14
Mellon Nat'l. Bank & Trust Co., Pittsburgh, Pa.	CA	25,078.13
Mellon Nat'l. Bank & Trust Co., Pittsburgh, Pa.	SA	26,779.10
First Nat'l. Bank of Miami, Florida	CA	15,969.13
First Nat'l. Bank of Miami, Florida	SA	20,846.75
Totaling		$126,297.55

and eighty per cent of the following two accounts:

Mahoning Nat'l. Bank, Youngstown, Ohio	CA	$45,650.35
Dollar Savings & Trust Co., Youngstown, Ohio	CA	7,553.68
totaling the amount of		$53,204.03

No withdrawals were made from any of said seven accounts by either Fred S. Geer or Leetha H. Geer, deceased, during the life of Leetha H. Geer.

No evidence or testimony was introduced and no claim was made by Fred S. Geer that Leetha H. Geer was only a trustee or agent for the sole benefit of Fred S. Geer either during the life of both or at the death of either.

The Court finds and determines that by the terms of said deposits as well as by the private arrangements of Fred S. Geer and Leetha H. Geer that Leetha H. Geer had an equitable as well as a legal right to said accounts during her life equal to that of Fred S. Geer and that in the event Leetha H. Geer had survived Fred S. Geer, said Leetha H. Geer would have had an equitable and legal ownership of the entire amount of said accounts subject to Ohio succession inheritance tax and the amounts of said accounts would not have been an asset in Fred S. Geer's estate or subject to Fred S. Geer's debts or distribution under his estate.

(Page 4 of Journal)

It therefore becomes unnecessary for this Court to determine the competency or weight of the testimony of Fred S. Geer, relating to the verbal and private agreement or understanding he had with his wife or to reject it either as incompetent evidence as a self-serving declaration or to determine its weight as unsupported verbal testimony for the reason that the evidence and admissions in testimony by the exceptor Fred S. Geer clearly indicated that by the nature of the accounts and the terms of the deposits either Fred S. Geer or Leetha H. Geer could have withdrawn any or all of said moneys during the life of both, and for the reason that by the testimony of Fred S. Geer it was clearly shown that their understanding gave either Leetha H. Geer or Fred S. Geer an equal right to withdraw all or any part of said accounts during the life of both for the use of the one withdrawing it, and for the further and controlling reason by the nature of the accounts as well as by the clear intent of Fred S. Geer and Leetha H. Geer that upon the death of Fred S. Geer, if he should

die first, the total amounts of the accounts on the date of his death would be the sole property of Leetha H. Geer.

The Court finds and determines that Section 5731.02(E) Revised Code is a constitutional, valid and reasonable exercise of the taxing power of the State of Ohio.

The Court further finds and determines that Section 5731.02(E) Revised Code as amended June 17, 1957, is a legal, valid and enforceable statute and when the joint and survivor property owners are husband and wife it is in accord with the legislative intent in enacting Section 5731.02 (E) Revised Code that one-half of the total value of such joint property accruing to a survivor at the death of the other is a taxable succession regardless of the amount the survivor contributed to the joint property.

(Page 5 of Journal)

It is therefore the decision of the Court that the joint and survivorship property of the hereinbefore described seven accounts of the total value of $126,297.55 and of the hereinbefore described two accounts of the total value of $53,204.03 became and is the property of Fred S. Geer as the survivor but subject to a succession inheritance tax on one-half of the above totals.

The Court determines that it is a just and proper order that the inheritance succession tax in the above estate be in the same amount as in the original determination certified December 12, 1958, to which determination Fred S. Geer as Executor and as an individual filed exceptions, which exceptions are not well taken and are hereby dismissed.

Exceptions to Fred S. Geer as Executor of the Estate of Leetha H. Geer, deceased, and as an individual.

/s/ CLIFFORD M. WOODSIDE,
Judge.

APPENDIX 3

IN THE COURT OF APPEALS, MAHONING COUNTY, OHIO, SEVENTH APPELLATE DISTRICT

No. 4175

IN THE MATTER OF THE ESTATE OF LEETHA H. GEER, *Deceased.*

FRED S. GEER, EXECUTOR OF THE ESTATE OF LEETHA H. GEER, *Deceased, and* FRED S. GEER, INDIVIDUALLY, *Appellants,*

vs.

STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO, *Appellee.*

JOURNAL ENTRY

(FILED NOVEMBER 27, 1961)

This matter came on for consideration pursuant to appeals filed by Fred S. Geer, individually and as executor for the estate of Leetha H. Geer, deceased, from an adverse final determination by the Probate Court of Mahoning County.

The Court, being fully advised in the premises, finds that there is no error in the final determination complained of and the same shall be and is hereby affirmed.

Exceptions to appellant.

/s/ PAUL W. BROWN,
/s/ LYNN B. GRIFFITH,
/s/ JOHN H. DONAHUE,
Judges.

Approved:

/s/ H. HERSCHEL HUNT,
Attorney for Appellants.

/s/ MARK MCELROY,
Attorney General.

/s/ JOSEPH L. WHITE,
Assistant Attorney General,
Attorneys for Appellee.

APPENDIX 4

THE SUPREME COURT OF THE STATE OF OHIO

1962 TERM

To wit: Wednesday, March 21, 1962

No. 37393

THE STATE OF OHIO, City of Columbus

IN RES ESTATE OF LEETHA H. GEER: FRED S. GEER, EXR. ETC. ET AL., *Appellants*,

vs,

STANLEY J. BOWERS, TAX COMMR., *Appellee*.

APPEAL FROM THE COURT OF APPEALS FOR MAHONING COUNTY

This cause, here on appeal as of right from the Court of Appeals for Mahoning County was heard in the manner prescribed by law and upon motion of the appellee to dismiss such appeal.

On consideration thereof, such appeal is dismissed for the reason that no debatable constitutional question exists herein.

It is further ordered that the appellee recover from the appellants his costs herein expended; that a mandate be sent to the Probate Court for Mahoning County to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Mahoning County for entry.

IN THE SUPREME COURT OF THE STATE OF OHIO

1962 TERM

To wit: Wednesday, March 21, 1962

No. 37393

THE STATE OF OHIO, City of Columbus

IN RES ESTATE OF LEETHA H. GEER: FRED S. GEER, EXR. ETC. ET AL., *Appellants*,

vs.

STANLEY J. BOWERS, TAX COMMR., *Appellee*.

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS FOR MAHONING COUNTY TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $20.00, paid by Fred S. Geer.

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No. 304

IN THE

Supreme Court of the United States

October Term, 1962

On Appeal from the Supreme Court of Ohio

IN RE: ESTATE OF LEETHA H. GEER, DECEASED.

FRED S. GEER, EXECUTOR OF THE ESTATE OF LEETHA H. GEER, DECEASED AND FRED S. GEER, INDIVIDUALLY,

Appellants,

vs.

STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO,

Appellee.

MOTION TO DISMISS AND STATEMENT OPPOSING JURISDICTION

MARK MCELROY,
Attorney General of Ohio,
THEODORE R. SAKER,
First Assistant Attorney General,
JOSEPH L. WHITE,
Assistant Attorney General,
State House Annex, Columbus 15, Ohio,
Attorneys for Appellee.

H. HERSCHEL HUNT,
1509 Central Tower, Youngstown 3, Ohio,
Attorney for Appellants

APPENDIX 5

SECTION 1105.09 Deposits in name of two or more persons. (GC Section 710-120)

When a deposit is made, in any bank or trust company transacting business in this state, in the name of two or more persons, payable to either or the survivor, such deposit or any part thereof or any interest or dividend thereon, may be paid to either of said persons, whether the other is living or not, and the receipt or acquittance of the person paid is a sufficient release and discharge of the bank for any payments so made.

(3359-7)

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In the

Supreme Court of the United States

October Term, 1962

No. 304

IN RE: ESTATE OF LEETHA H. GEER, DECEASED,

FRED S. GEER, EXECUTOR OF THE ESTATE OF LEETHA H. GEER, DECEASED AND FRED S. GEER, INDIVIDUALLY,

Appellants,

vs.

STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO,

Appellee.

MOTION TO DISMISS AND STATEMENT OPPOSING JURISDICTION

MOTION TO DISMISS

Appellee in the above-styled cause, pursuant to Rule 16 (1) (b) of the Revised Rules of the Supreme Court of the United States, moves that this appeal be dismissed on the ground that it does not present a substantial federal question and for the further reason that the judgment rests upon an adequate nonfederal basis.

STATEMENT OPPOSING JURISDICTION

The appellee in the above-entitled cause, for his statement in opposition to appellants' statement as to jurisdiction and in support of appellee's motion to dismiss, respectfully states the following:

I.

STATEMENT OF THE CASE AND FACTS

The appellants are seeking herein a review of unanimous decisions by the Supreme Court of Ohio which dismissed their appeal as of right for lack of a debatable constitutional question and, further, overruled their motion to certify the record of the Mahoning County Court of Appeals to that Court for review, for the apparent reason that the appeal did not present a question of sufficiently public or great general interest.

The instant appeal originated as the result of a statutory amendment enacted by the Ohio General Assembly, effective June 17, 1957. Prior to such date, the Ohio Inheritance Tax Act, Section 5731.01, *et seq.*, Ohio Revised Code, contained a levying provision on joint and survivorship property passing as a nonprobate asset to the surviving joint tenant. Section 5731.02 (E), Ohio Revised Code, *then* read as follows:

> "A tax is hereby levied upon the succession to any property passing, in trust or otherwise, for the use of a person, institution, or corporation, in the following cases:
>
> "• • • • • • • • • • • •
>
> "(E) Whenever property is held by two or more persons jointly, so that upon the death of one of them the survivor has a right to the immediate ownership or possession and enjoyment of the whole property, the accrual of such right by the death of one of them shall be deemed a succession taxable under this section, in the same manner as if the enhanced value of the

> whole property belonged absolutely to the deceased person, and he had bequeathed the same to the survivor by will;
> "* * * * * * * * * * * * * * *"

Effective June 17, 1957, and upon the instigation of the Probate Code Committee of the Ohio Probate Judges Association, the Ohio General Assembly amended Section 5731.02 (E), Ohio Revised Code, by inserting the following language:

> "* * * provided when the persons holding said property jointly are a husband and wife, the survivor shall be deemed to have a succession taxable to the extent of one-half the total value of the property without regard to enhancement;"

The appellants contend that this amendment violates the due process clauses of the Fifth and Fourteenth Amendments and the equal protection clause of the Fourteenth Amendment, and that it impairs the obligation of contract restriction of Article I, Section 10, all portions of the Constitution of the United States. On behalf of the Tax Commissioner of Ohio, appellee, herein, it is respectfully submitted that the instant appeal does not present a substantial federal question and that the judgment appealed from rests upon an adequate nonfederal basis.

II.

THE INSTANT APPEAL DOES NOT PRESENT AN ADEQUATE FEDERAL QUESTION

The presumption in favor of the constitutionality of statutes applies with added force and weight to laws imposing taxation.

United States v. Jacobs, 306 U.S., 363

All of the appellants' constitutional arguments have been previously passed upon by this honorable Court and have been found lacking.

United States v. Rompel, 326 U.S., 367
Fernandez v. Wiener, 326 U.S., 340
Foster v. Commissioner of Internal Revenue, 303 U.S., 118
Gwinn v. Commissioner, 287 U.S., 224
Tyler v. United States, 281 U.S., 497
Saltonstall v. Saltonstall, 276 U.S., 260
Stebbins v. Riley, 268 U.S., 137
Moffit v. Kelly, 218 U.S., 400
Magoun v. Illinois Trust & Saving Bank, 170 U.S., 283
Gulf, Colorado and Santa Fe Ry. Co. v. Ellis, 165 U.S., 150
United States v. Perkins, 163 U.S., 625
Bell's Gap R'd Co. v. Pennsylvania, 134 U.S., 232
Kentucky Railroad Tax Cases, 115 U.S., 321
Scholey v. Rew, 23 Wall., 331
Steen v. United States, 195 F. (2d), 379, certiorari denied 344 U.S., 822

III.

THE DECISION OF THE SUPREME COURT OF OHIO RESTS UPON AN ADEQUATE NONFEDERAL BASIS

The construction by the Ohio Supreme Court of Section 5731.02 (E), Ohio Revised Code, is binding upon this honorable Court unless there is a substantial violation of rights under the Constitution of the United States.

United States v. Burnison, 339 U.S., 87
United States v. Fox, 94 U.S., 315

The Ohio State Supreme Court has held the Ohio inheritance tax to be constitutional.

Harvard College v. State, 106 Ohio St., 303

An earlier form of this statute was held not to be unconstitutional by reason of its discrimination between collateral kindred.

Hagerty v. State ex rel. Dyer, 55 Ohio St., 613

The very provision in question has been held to be constitutional by the Ohio Supreme Court.

In re Estate of Evans, 173 Ohio St., 132

The common-law doctrine of the unity of husband and wife is modified in Ohio only so far as it is done by specific statutory provisions.

State v. Phillips, 85 Ohio St., 317

At common law, husband and wife were said to be one person.

Coolidge and Wife v. Parris, 8 Ohio St., 594

Rather than impairing the obligation of contract, as alleged by appellants, the classification in question is founded *upon* contract, i.e, the contract of marriage.

Waymire etc. v. Jetmore and Spencer, 22 Ohio St., 271

Therefore, it seems abundantly clear that a classification for tax purposes, of husbands and wives, as distinguished from other individuals, is so patently reasonable that a review by this Court is wholly unnecessary.

IV.

CONCLUSION

It is respectfully submitted, on behalf of the appellee, that Section 5731.02 (E), Ohio Revised Code, is a valid, constitutional exercise of legislative authority by the Ohio General Assembly. Therefore, appellee respectfully prays that the instant appeal be hereby dismissed.

Respectfully submitted,

MARK MCELROY,
Attorney General of Ohio,
THEODORE R. SAKER,
First Assistant Attorney General,
JOSEPH L. WHITE,
Assistant Attorney General,
State House Annex, Columbus 15, Ohio,
Attorneys for Appellee.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 304

IN RE: ESTATE OF LEETHA H. GEER, DECEASED

FRED S. GEER, EXECUTOR OF THE ESTATE OF LEETHA H. GEER, DECEASED AND FRED S. GEER, INDIVIDUALLY,
Appellants,

vs.

STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO,
Appellee.

BRIEF OF APPELLANTS OPPOSING MOTON TO DISMISS

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SUPREME COURT OF THE UNITED STATES

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STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO,

Appellee

BRIEF OF APPELLANTS OPPOSING MOTON TO DISMISS

Appellee states that Appellants are seeking to review the *unanimous decisions* of the Supreme Court of Ohio which dismissed their Appeal as of Right, and overruled their Motion to Certify the Record.

It was previously pointed out on page 16 of the Jurisdictional Statement, in *Re Estate of Evans*, 173, Ohio St., 132; 180 N.E. 2d, 827, which was decided by the Supreme Court of Ohio on February 28, 1962, in which the constitutionality of Revised Code, Section 5731.02(E) was upheld, the Ohio Supreme Court decided the Geer case on March 21, 1962, obviously on the ground that they had decided the same question in the Evans case.

Appellee, is in error in stating this was a unanimous

decision of the Supreme Court. Judge Taft wrote a comprehensive dissenting opinion in the Evans case which is set out in the report of said case, and it will be noted from the report of the Geer case that while Judge Taft did not specifically dissent, he did not concur in the decision on the Appeal as of Right.

Appellee further states that this Amendment was instituted by the Ohio Probate Code Committee of the Ohio Judges' Association.

This Court is entitled also to be informed that when this Amendment was proposed, it was thought by many at least to do nothing more or less than to make statutory a rule promulgated by the Tax Commissioner of Ohio which had been in force for many years. This rule provided that joint and survivorship accounts between husband and wife should be taxed at one-half of their total value, unless evidence was introduced showing the contributions, if any, of each: in which case, only the contribution of the decedent was taxable.

The probate courts took different views on the interpretation of this Amendment. In the *Evans* case, the report shows that the Probate Court of Allen County held that the joint and survivorship bonds were the sole property of the survivor and non-taxable. The Court of Appeals reversed the Probate Court, and the Supreme Court of Ohio affirmed the Court of Appeals.

The Probate Court of Trumbull County in the *Kaski* case (not reported) also held that joint and survivorship bonds which were the sole property of the survivor were not subject to the tax. The Court of Appeals reversed this decision which was not carried further. While in this case, the Probate Court held the funds which were found to be the sole property of Fred S. Geer were subject to tax to the extent of one-half thereof.

The Amendment in 1957 to Revised Code, Section 4731.02 (E) Creates a Conclusive Presumption in Violation of the Constitution of the United States.

In support of the Motion to Dismiss, Appellee cites a great many cases from community property and common law states. We believe that such cases have no application to the rights of husband and wife in Ohio. Ohio is neither a common law state nor a community property state, but by statute as shown in the Jurisdictional Statement, (pages 11 and 12) husband and wife have no interest in each others property, and may contract with each other or third persons as if unmarried.

The Supreme Court of Ohio, in the previous case, *In re, Estate of Evans*, 173 Ohio St., 132, in its opinion made no reference to the question of a conclusive presumption. However, it did specifically hold that under this amendment property which was found to be the sole property of the survivor was subject to tax to the extent of 50% of its value, which necessarily means that this presumption was not rebuttable regardles of the facts.

The interpretation of a state statute by the highest court of the state is binding upon this court. If this interpretation is in violation of the Constitution of the United States, the statute is invalid.

This Court has consistently held that a conclusive presumption created by statute is invalid whether it be treated as a rule of evidence or of substantive law. *Schelsinger v. Wisconsin*, 270 U.S., 230; *Heiner v. Donnan*, 285 U.S., 312.

In *Hooper v. Tax Commissioner of Wisconsin*, 284 U.S., 206 the Syllabus is as follows:

> "1. A Wisconsin income tax statute which authorizes an assessment against a husband of a tax computed on the combined total of his and his wife's income

and augmented by surtaxes resulting from the combination, although under the laws of the State the husband has no interest in or control over the property or income of his wife, held violative of the due process and equal protection clauses of the Fourteenth Amendment. P. 215.

"2. The statute as so applied cannot be justified either as necessary to prevent frauds and evasions or, since it is essentially a revenue measure, as a regulation of the marriage relation." Pp. 216, 217, 202 Wisc. 493; 233 N.W. 100 reversed."

We submit that the attempted classification of this Amendment as to husband and wife is arbitrary and has no basis in fact or experience.

Prior to this Amendment there was no distinction in the Statute as to joint and survivorship property held by anyone. It was only the "enhanced value"; or, in other words the portion owned by the decedent that was taxable, whether husband and wife or otherwise. We believe that there is no justifiable inference that property held jointly by the husband and wife is actually owned one-half by the husband and one-half by the wife. This is supported by many decisions of the Supreme Court of Ohio, some of which are set forth in the Jurisdictional Statement under "Contract between the Depositors themselves" (pages 8 to 11), the substance of which is that the actual ownership between the parties themselves must be determined and each case must rest upon its own particular facts.

Under the Ohio succession tax the right to succeed is the basis of the right. A person cannot succeed to that which he already owns. If there is no succession, there can be no right to succeed and no tax. This is true regardless of whether the joint owners are husband and wife or

anyone else, related or otherwise. While there may be justification for a different classification between husband and wife as to exemptions or rate of tax, etc., in this situation we believe there is no sound basis for this attempted classification, and, therefore, said classification on its face is arbitrary, discriminatory and in violation of the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution.

Conclusion

Appellants respectfully contend that Section 5731.02(E), Ohio Revised Code, violates the due process clause of the Fifth Amendment and the Fourteenth Amendment of the United States Constitution.

That said section is repugnant to the equal protection clause of the Fourteenth Amendment of the United States Constitution.

That said section impairs the obligation of the joint and survivorship contract between husband and wife as to said accounts and is in violation of Article I, Section 10 of the United States Constitution.

WHEREFORE, Appellants respectfully pray that the Motion to Dismiss be overruled, and jurisdiction noted.

Respectfully submitted,

H. HERSCHEL HUNT,
1509 Central Tower,
Youngstown 3, Ohio,
Attorney for Appellants.